Filed 10/26/09 Harper v. Superior Court CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BRYAN HARPER et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; 24 HOUR FITNESS, INC., Real Party in Interest.	No. B215252 (Super. Ct. No. BC245746) (Robert L. Hess, Judge)

ORIGINAL PROCEEDING; petition for writ of mandate. Robert L. Hess, Judge. Writ denied.

Law Offices of Stephen Glick, Stephen Glick; Daniels, Fine, Israel & Schonbuch, Paul R. Fine, Scott A. Brooks; Law Offices of Ian Herzog, Ian Herzog and Evan D. Marshall, for Petitioners Bryan Harper and Mark Salzwedel.

No appearance for Respondent.

Horgan, Rosen, Beckham & Coren and Richard A. McDonald for Real Party in Interest.

In this Petition for Writ of Mandate, Bryan Harper and Mark Salzwedel ask this Court to direct the trial court to reverse its order striking their challenge under Code of Civil Procedure section 170.6, subdivision (a)(2) and to order this matter reassigned to a new judge. Our prior decision in this matter reversed an order by the trial court that neither terminated the action nor made a determination on the merits. As a result, petitioners were not entitled to exercise a challenge under the statute, and we deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioners filed the underlying action in this case as a representative and class action on February 27, 2001. The court granted their motion for class certification as to the second and third causes of action of the Third Amended Complaint on October 16, 2003[1]; after significant additional proceedings, the court entered an order on January 19, 2006 decertifying the class, and ordering completion of discovery and trial scheduling. In a previous proceeding, this Court reversed the order decertifying the class.[2]

Following the issuance of the remittitur on March 11, 2009, petitioners filed a challenge to the trial judge pursuant to Code of Civil Procedure section 170.6, subdivision (a)(2)[3] on March 23, 2009. Real Party in Interest, 24 Hour Fitness, Inc. objected to the challenge. On April 1, 2009, the trial court, relying on *State Farm Mutual Automobile Ins. Co. v. Superior Court* (2004) 123 Cal.App.4th 1424 (*State Farm*) and *Burdusis v. Superior Court* (2005) 133 Cal.App.4th 88 (*Burdusis*), struck the challenge on the ground that there had been no trial triggering the statute because decertification of

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1 An appeal of the partial denial of the motion for class certification was determined by this Court in 2004. (*Harper v. 24 Hour Fitness, Inc.* (August 31, 2004, B166123) [nonpub. opn.].).

2 *Harper v. 24 Hour Fitness, Inc*. (2008) 167 Cal.App.4th 966.

3 All further statutory references, unless otherwise noted, are to the Code of Civil Procedure.

the class neither terminated the action nor addressed the merits of the matter.[4] Petitioners filed this Petition for Writ of Mandate on April 9, 2009, and the parties fully briefed the matter after this Court issued an order to show cause.

DISCUSSION

Section 170.6, subdivision (a)(2) permits a party to file an affidavit of prejudice after a reversal on appeal under specified circumstances: "A motion under this paragraph may be made following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. Notwithstanding paragraph (3), the party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion under this section regardless of whether that party or side has previously done so. The motion shall be made within 60 days after the party or the party's attorney has been notified of the assignment." (§ 170.6 subd. (a)(2).)

The scope and meaning of this statute, intended to avoid potential bias by a judge reversed on appeal, have been the subject of many challenges, most turning on the meaning of the term "new trial." In previously addressing this issue, and mindful of the Supreme Court's rejection of the proposition that the statute is to be liberally construed (*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1263), we have concluded that this "analysis requires a determination of whether there has been a trial, and whether there will be a retrial. We have previously concluded that the dividing line in determining whether there had been a trial was whether the trial court's initial decision had 'either addressed the merits or otherwise terminated the case.' (*Burdusis*[, *supra*,] 133 Cal.App.4th [at p.] 93.)" (*First Federal Bank of California v. Superior Court* (2006) 143 Cal.App.4th 310, 314.) We have also addressed the issue of retrial, concluding that a

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[4] Petitioners had initially filed the challenge in January 2009, and the court had denied it in February, but, because remittitur had not yet issued, this Court issued an Order and Alternative Writ on February 6, 2009, and the trial court vacated its order on March 3, 2009.

retrial is a "'reexamination' of a factual or legal issue that was in controversy in the prior proceeding. [Citations.]' (*Geddes, supra,* 126 Cal.App.4th at. p. 424.)" (*First Federal Bank of California v. Superior Court, supra,* 143 Cal.App.4th at p. 314.)

The two-part determination required by the statute thus looks first to the nature of the proceeding that preceded appellate review[5], and then to the proceedings that will follow on remand. Petitioners here challenge the determination, under the first prong of the analysis, that there has been neither a termination of the case nor a decision addressing the merits, arguing that the death knell doctrine, permitting the appeal of a denial of class certification, establishes termination. They also assert that the continuing obligation of the trial court to make determinations concerning the scope of the class and the nature of class relief implicates the second prong of the analysis.

We have previously determined that an order denying class certification is not a determination on the merits, because in ruling on such a motion the trial court does not evaluate the merits of the claim. (*Burdusis, supra,* 133 Cal.App.4th at p. 93; see also *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-327; *Ghazaryan v. Diva Limousine* (2009) 169 Cal.App.4th 1524.)

With respect to termination of the action, *State Farm,* in detailing the nature of the cases in which section 170.6, subd. (a)(2) has been held applicable, referred expressly to cases where no further proceedings in the trial court would occur after the ruling at issue. (*State Farm, supra,* 121 Cal.App.4th at p. 497) That is not the case here. Instead, the trial court's ruling expressly ordered further proceedings in the case with respect both to these petitioners' individual claims and as to the representative claims, all of which the trial court's order maintained as active proceedings. In fact, therefore, the order did not terminate the action, either as to the petitioners, or as to the parties they sought to represent.

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[5] While the statutory language refers to appeal, it has been held applicable to writ proceedings. (*Overton v. Superior Court* (1994) 22 Cal.App.4th 112, 115-116; see also *State Farm, supra,* 121 Cal.App.4th at p. 499.)

Petitioners, however, assert that the fact that an appeal was permissible in this case requires that, for purposes of our analysis, we find that the case was terminated with respect to the rights of the absent class members, relying on the death knell doctrine set forth in *Daar v. Yellow Cab* (1967) 67 Cal.2d 695. There, the Supreme Court held that, for purposes of appeal, the issue is the "legal effect" of the ruling at issue. In the context of the denial of class certification, such an order "is tantamount to a dismissal of the action as to all members of the class other than plaintiff. . . . If the propriety of such disposition could not now be reviewed, it can never be reviewed." (*Id*. at p. 699.)

The fact that a prompt review of the determination that an action cannot proceed with respect to absent putative class members is appropriate and protects their rights to participate as class members in an action does not require that we find that the trial court's order here terminated the case for all purposes. In fact, as set forth above, the order did no such thing. And, in any event, even without the trial court's belief that the action could proceed as a representative action, both the purported class representatives, as well as each of the putative class members, maintained their individual rights to pursue their legal claims, albeit without the procedural advantages of an appropriate class action.

Acting on this right to appeal what would otherwise not be a final judgment terminating the action, Petitioners, and those who they seek to represent, were able to appeal the decertification order, and to obtain the relief they sought. This broad prophylactic construction of the right to appeal, however, does not mandate a similarly broad construction of the right to file a post-appeal peremptory challenge to a trial judge, in light of the cautionary warning by the Supreme Court that "with respect to the assertion that section 170.6 must be given a liberal construction, our own cases have observed that because of the dangers presented by judge-shopping -- by either party -- the limits on the number and timing of challenges pursuant to this statute are vigorously enforced. [Citation.] We do not believe that the 1985 amendment of section 170.6, subdivision (2) was intended to eliminate all restrictions on the challenge or to counter every possible situation in which it might be speculated that a court could react negatively to a reversal on appeal." (*Peracchi, supra*, 30 Cal.4th at p. 1263.) The

Supreme Court did not hold that such a challenge is permitted in any situation in which there is a potential for bias, finding no such legislative intent. (*Id*. at p. 1262.) Under the circumstances presented here, we find no basis for the broad interpretation urged on us by petitioners.

As in *Burdusis*, our conclusion that the first prong of the test has not been satisfied means that we need not reach the question of whether the tasks remaining to be performed by the trial court would constitute a retrial.

While we conclude that Petitioners did not have the right to file the challenge at issue, we are also mindful of the history of this case, and the repeated appellate proceedings. In light of that history, we order that, on remand, the case be re-assigned for all further proceedings. (See *Peracchi, supra*, 30 Cal.4th at pp. 1256, 1262.)

DISPOSITION

The petition is denied. Real party in interest is to recover its costs in these original proceedings.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.